No. 94-0379

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In The

Supreme Court of the United States

October Term, 1994

ANHEUSER-BUSCH COMPANIES, INC. and CAMPBELL TAGGART, INC.,

Petitioners,

vs.

SUMMIT COFFEE COMPANY and THE DUNNAM-SNYDER COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Texas for the Fifth District of Texas at Dallas

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether section 12(2) of the Securities Act of 1933 applies to a sale of securities procured through misrepresentations in a prospectus used to procure the sale.

2. Whether section 12(2) of the Securities Act of 1933 provides a remedy to a defrauded buyer of securities who timely tendered the securities to the seller upon discovering the seller's misrepresentations.

3. Whether section 14 of the Securities Act of 1933 ensures that only known claims under section 12(2) are waived.

LIST OF PARTIES

Petitioners: Anheuser-Busch Companies, Inc. and Campbell Taggart, Inc.

Respondents: Summit Coffee Company and The Dunnam-Snyder Company[1]

1. Pursuant to Sup. Ct. R. 15.2 and 29.1, Respondents certify that S.W. Dunnam Trust Estate, Louise M. Dunnam Trust Estate, Sam W. Dunnam, III Trust, Mr. and Mrs. Samuel Dunnam Trust of 1979, and Snyder Childrens' Trust of 1984 are all of the parent entities of The Dunnam-Snyder Company. Summit Coffee Company is a subsidiary of The Dunnam-Snyder Company.

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APPENDIX

Appendix A — Statutory Provisions 1a

FORWARD

The statement of facts, *i.e.*, trial testimony, will be cited as "SF." followed by the volume(s) and page number (s) to which reference is made.

The transcript, *i.e.*, trial pleadings, will be cited as "Tr." followed by the page number (s) to which reference is made.

Exhibits will be cited as identified in the trial court, *e.g.*, "Def. Ex.," "Ely Ex.," followed by the exhibit number.

Unless otherwise indicated, all emphasis is supplied by counsel.

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ANHEUSER-BUSCH COMPANIES, INC. and CAMPBELL TAGGART, INC.,

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SUMMIT COFFEE COMPANY and THE DUNNAM-SNYDER COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Texas for the Fifth District of Texas at Dallas

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Summit Coffee Company ("Summit") and The Dunnam-Snyder Company ("Dunnam-Snyder") (collectively "Respondents") request that this Court deny the petition for writ of certiorari to review the judgment of the Court of Appeals of Texas entered on June 9, 1993. The Texas Supreme Court denied review.

STATUTES INVOLVED

Federal Statutes:

15 U.S.C.A. (West 1988):
§ 77b(10)
§ 77l(2)
§ 77n

State Statutes:

Tex. Rev. Civ. Stat. Ann. (Vernon Supp. 1994):
art. 581-33A(2)
art. 581-33D
art. 581-33E
art. 581-33L

The federal statutes were reproduced in full in the petition. The state statutes are reproduced in full in Appendix A to this brief.

STATEMENT OF THE CASE

Petitioner Campbell-Taggart, Inc. ("Campbell-Taggart") purchased all of the stock of Herby's Foods, Inc. ("Herby's") in 1981 for between $10 and 11 million. [SF. III - 2-3; Ely Ex. 14]. Over the next five years, Campbell Taggart took Herby's from a company earning over $1 million per year to a company losing $1 million per year. [Ely Ex. 14; SF. VI - 617-20, 643-44; VII - 814]. Consequently, Petitioners identified Herby's as a divestiture candidate and spoke to several companies about a possible sale. [SF. III - 13-16; VII - 897-98, 902-03, 912]. They finally sold Herby's stock to Summit for $5.5 million. [Ely Ex. 52A; SF. II - 144; III -95]. However, Petitioners procured the sale only through several critical misrepresentations in the prospectus used to solicit the sale as well as other documents they provided Summit while it investigated Herby's.

First, Petitioners misrepresented the rental rate, termination, and substitute vehicle provisions of the lease which provided Herby's the vast majority of its distribution capability. The true terms made Summit's corporate plan for the acquisition unworkable. [Def. Ex. 8; Ely Ex. 14; SF. IV - 255-56; VI - 629; Def. Ex. 10; SF. IV - 262-64; VI - 630-31; VII - 925; III - 236-38]. Second, Petitioners misrepresented the number of legal claims pending against Herby's as of the closing. They failed to disclose at least 21 known claims, which ultimately cost well over ten percent of the purchase price to resolve. This enabled Petitioners to induce Summit to close the stock purchase even though Petitioners revealed at the very last minute the disproportionately large deductibles under their insurance program that covered Herby's. Summit nearly abandoned the deal. Had it known of the undisclosed claims, Summit would have. [SF. I - 272-77; II - 178-80; III - 34-7; VIII - 1034-35; IV - 278].

Presented with almost two weeks of evidence, the jury found that Petitioners violated the Texas Securities Act (the "Texas Act"), in particular Tex. Rev. Civ. Stat. art. 581-33A(2), and section 12(2) of the Securities Act of 1933.[2] Because the jury also found that Summit timely tendered the stock back to Petitioners, the trial court allowed Summit the only remedy available under the Texas Act and section 12(2) by awarding Summit the price paid for the stock less any income received. Summit was also awarded pre- and post-judgment interest and attorneys' fees under Texas law.

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2. Campbell Taggart, as the seller, was found to have directly violated both the Texas Act and section 12(2), and Anheuser-Busch Companies, Inc. ("Anheuser-Busch") was held liable as a controlling person who aided Campbell Taggart in its violations. [Tr. 707, 709, 713]. Of course, Anheuser-Busch could be held liable as an aider only under the Texas Act. *Compare* Tex. Rev. Civ. Stat. Ann. art. 581-33F(2) (aider liability provided by statute) *with Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 114 S. Ct. 1439, 1449 (1994) (section 12 "limits liability to those who offer or sell the security").

The Texas Court of Appeals (the "Texas court"), finding that the Texas Act "is arguably broader than the comparable federal language," affirmed the trial court's judgment under both the Texas Act and section 12(2). The Texas Supreme Court denied Petitioners' application for writ of error therefore finding that the application presented no error which either required reversal or was of such importance to the jurisprudence of the state as to require correction. Tex. R. App. P. 133(a). Petitioners' motion for rehearing on their points of error was overruled.

REASONS FOR DENYING THE WRIT

Despite Petitioners' claim to the contrary, the court's decision in *Gustafson v. Alloyd Co.*, No. 93-404, *cert. granted*, 114 S. Ct. 1215 (1994), cannot disturb Summit's judgment against Petitioners. This case, unlike *Gustafson*, involves the application of the Texas Act that applies to any and all sales of securities.[3] Because Summit's recovery is based on the Texas court's construction and application of the Texas Act which applies to Petitioners' fraud even if section 12(2) does not, the Court lacks jurisdiction to review and should not review this state law-based judgment.

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3. Petitioners' conclusion in their footnote 8 that the Texas court did not independently analyze the Texas Act is simply incorrect. As discussed below, the Texas court specifically analyzed and applied the Texas Act. Further, while Texas courts commonly review federal decisions when interpreting state securities laws, Texas courts, including this one, have consistently stated that such decisions are used only as "guides." *Anheuser-Busch Cos. v. Summit Coffee Co.*, Pet. A23; *First Mun. Leasing Corp. v. Blankenship, Potts, Aikman, Hagin & Stewart*, 648 S.W. 2d 410, 414 (Tex. App. — Dallas 1983, writ ref'd n.r.e.). In fact, Texas courts will not follow federal decisions when "statutorily or constitutionally mandated [by state law] to do otherwise." *Brown v. State*, 657 S.W. 2d 797, 799 (Tex. Crim. App. 1983) (en banc).

A. The Judgment Rests on Adequate and Independent State Grounds.

Under the plain statement test adopted in *Michigan v. Long*, 463 U.S. 1032 (1983):

> If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a *plain statement* in its judgment or opinion *that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached*. . . . If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate and independent grounds, we, of course, *will not undertake to review the decision.*

Id. at 1041.[4] Only when the state court's decision "fairly appears" to rest primarily on federal law will the Court presume that independent and adequate state grounds do not exist. *Id.* at 1042.

In this case, the Texas court plainly stated that federal precedent was used to guide – not compel -- its conclusions under the Texas Act. Finding the language in the Texas Act "arguably broader" than the federal statute, the Texas court simply applied the Texas Act in this case. Consequently, having satisfied the plain statement test announced in *Long*, further review is precluded. *Long*, 463 U.S. at 1041; *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977); *Herb*, 324 U.S. at 125.

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4. This principle, at least in part, is based on the Court's jurisdictional limitations as proscribed by Article III of the United States Constitution. *Id.* at 1041-42 (citing *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945)).

1. *The Texas Act Is Adequate to Support the Judgment.*

Even if the Court ultimately concludes section 12(2) does not apply to a privately negotiated stock sale, that decision would not change the inescapable conclusion that the Texas Act applies to all sales of securities, including the one at issue in this case.[5] Therefore, review of this case by the Court would be futile.[6]

A cursory review of the Texas Act reveals that the Texas court properly employed state law to affirm the judgment against Petitioners. The Texas Act provides that:

> A person who offers or sells a security . . . by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, is liable to the person buying the security from him. . . .

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5. In fact, even if the Court remanded this case, Petitioners would be precluded from arguing otherwise due to their failure to challenge the applicability of the Texas Act in either their motion for rehearing to the Texas court or their application for writ of error to the Texas Supreme Court. Tex. R. App. P. 131(e); *Albright v. City of Houston*, 677 S.W. 2d 487, 488 (Tex. 1984); *Sullivan v. University Interscholastic League*, 616 S.W. 2d 170, 173 (Tex. 1981).

6. The Court in *Long* did not foreclose in all instances the need to examine state law. *Long*, 463 U.S. at 1041 & n.6; *see Valley Forge Christian College v. Americans United For Sep. of Church & State, Inc.*, 454 U.S. 464, 472 (1982) ("[A]t an irreducible minimum, Art. III requires the party who evokes this court's authority to show that he personally has suffered " 'an injury that . . . is likely to be redressed by a favorable decision' "). Review of state law in this case is appropriate to ensure that the Court does not issue what is or will certainly become no more than an advisory opinion. *See Long*, 463 U.S. at 1042; *Herb*, 324 U.S. at 125.

Tex. Rev. Civ. Stat. Ann. art. 581-33A(2) (Vernon Supp. 1994). The statute applies to any "person who offers or sells a security." "Sells," in turn, includes "every . . . attempt to dispose of a security for value." Tex. Rev. Civ. Stat. Ann. art. 581-4E (Vernon Supp. 1994). Most importantly, unlike section 12(2) which applies to misrepresentations in a "prospectus or oral communication" (the language Petitioners contend restricts section 12(2) to public offerings), the Texas Act applies to any untrue statement or omission no matter the means of communication.

Any possible uncertainty about the breadth of the Texas Act is resolved by the drafters' comments where they used a secondary market transaction to illustrate its application. They stated:

> Example: X makes a secondary offering of Y Co. shares owned by him, at $10 a share, and the shares trade at a premium in the aftermarket, where P buys them at $12. . . . [P] may recover $12 from the person selling to him if that person has violated § 33A(2).

Tex. Rev. Civ. Stat. Ann. art. 581-33D cmt. (Vernon Supp. 1994). The drafters specifically recognized that a secondary market seller can be liable for the purchase price if he violates the Texas Act. As such, whether this case involves a privately negotiated rather than a public sale or an initial rather than a secondary offering is of no moment. *See, e.g., Comeau v. Rupp*, 810 F. Supp. 1127, 1157-58 (D. Kan. 1992) (Kansas securities act, which contains same language as the Texas Act, applies to all securities sales).

There is seemingly no disagreement that the Texas Act applies to all securities sales. For example, Petitioners themselves argue with respect to section 12(2) that "[i]f Congress had intended to create a remedy that applied to all securities sales, it could simply have left out [the] crucial phrase [by means of a prospectus or oral

communication]." Pet. 14. The petitioners in *Gustafson* as well as *amicus curiae* supporting them make the same argument. Brief for Petitioners, *Gustafson v. Alloyd Co., Inc.* No. 93-404, 1994 WL 178124 *15 (May 6, 1994); Brief of *Amicus Curiae* Securities Industries Association, Inc. In Support of Petitioners, *Gustafson v. Alloyd Co., Inc.*, No. 93-404, p. 9 (May 6, 1994). Of course, Texas Legislature left out the phrase by means of a prospectus or oral communication.

The uniform language and structure of the Texas Act, prior opinions construing those provisions, and the drafters' comments make clear that there is no public or initial offering limitation under art. 581-33A(2).[7] The jury found that Petitioners violated the Texas Act [Tr. 703-05], and the Texas court applied that finding in affirming the judgment. This entitled Summit to recover rescissory damages, pre- and post-judgment interest, and attorneys' fees measured by state law.[8] *Anheuser-Busch Cos.*, Pet. A24, 33-6. Therefore, as the state ground alone is broad enough to support the judgment, adequacy is established. *Eustis v. Bolles*, 150 U.S. 361, 370 (1893); *Beaupre v. Noyes*, 138 U.S. 397, 401 (1891); *Murdock v. Memphis*, 20 Wall. 590, 636 (1874). Further, because review

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7. Even if section 12(2) applies only to public offerings, contrary to this Court's holding in *Landreth Timber Co. v. Landreth*, 471 U.S. 681 (1985), the evidence submitted to the jury was sufficient to sustain a finding that this sale involved a public offering. [SF. III - 13-16; VII - 902-03]. Moreover, the trial court defined "prospectus" for the jury in its charge. [Tr. 710]. Therefore, the jury specifically found that Petitioners made their misrepresentations by means of a prospectus or oral communication within the meaning of section 12(2). As Petitioners have never asserted that this finding was not supported by sufficient evidence, it is binding on the parties and must be treated as conclusively established. *Anheuser-Busch Cos.*, Pet. A12-3.

8. Summit, of course, could not have recovered attorneys' fees under the Securities Act of 1933. *Melton v. Unterreiner*, 575 F.2d 204, 209 (8th Cir. 1978); *Aronson v. TPO, Inc.*, 410 F. Supp. 1375, 1380 (S.D.N.Y. 1976). And while (Cont'd)

would at best cause the rendition of an advisory opinion, the petition for writ of certiorari should be denied.

2. *The Texas Court Independently Applied State Law.*

Unlike the state court in *Long*, the Texas court stated throughout its opinion that its decision rested on its interpretation of Texas law. For example, the Texas court expressly disagreed with its sister court's interpretation of art. 581-33A(2). The Texas court stated:

> We are aware that the Texarkana court of appeals recently held that defrauded buyers [under art. 581-33A(2)] could recover damages even though they still owned the securities. *See Lutheran Bhd. v. Kidder Peabody & Co.*, 829 S.W. 2d 300, 307 (Tex. App. — Texarkana), *judgment set aside and cause remanded for rendition of agreed judgment*, 840 S.W. 2d 384 (Tex. 1992). We do not agree with this interpretation of the Texas statute. In any case, because damages are awarded using a rescissory measure, the distinction between the two remedies may be relatively unimportant.

Anheuser-Busch Cos., Pet. A24 n. 6.[9] *Cf. Long*, 463 U.S. at 1043 ("not a single state case was cited to support the state court's holding"). As such, the Court cannot presume that federal law compelled the Texas court's decision. *Coleman v. Thompson*, 111

(Cont'd)
Summit could have been awarded pre- and post-judgment interest under federal law, the Texas court did not even consider federal law when determining the applicable interest rates. *Anheuser-Busch Cos.*, Pet. A34-6.

S. Ct. 2546, 2558 (1991) ("*Per se* rules should not be applied . . . in situations where the generalization is incorrect as an empirical matter; the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time").

The Texas court did not stop there. It plainly stated that the federal cases it cited were only "reliable guides" in interpreting the Texas Act. *Anheuser-Busch Cos.*, Pet. A23. This wording fits precisely into the plain statement test announced in *Long*. 463 U.S. at 104 ("a plain statement in [the state court's] . . . opinion that the federal cases are being used only for the purpose of *guidance*"). Moreover, the Texas court concluded that "the Texas Legislature" did not intend an inability to return both parties to the status quo to bar the sole remedy available under the Texas Act. *Anheuser-Busch Cos.*, Pet. A24. The intent of the Texas Legislature would be immaterial had the Texas court felt compelled to follow federal law.[10]

In addition, the Texas court chose to "*adopt* and follow *the reasoning* and holdings in the . . . cited federal cases *in applying the Texas anti-waiver provision.*" *Anheuser-Busch Cos.*, Pet. A12. To "adopt" means "to take by choice . . .; to take voluntarily. . . ." Websters Ninth New Collegiate Dictionary 58 (1983). On the other hand, to "compel" means "to drive or urge forcefully and irresistibly," the antithesis of a voluntary choice to adopt. *Id.* at 268. Although persuaded by the federal courts' reasoning, the Texas court independently applied the Texas anti-waiver provision.

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9. No federal securities law claim was raised in the *Lutheran Bhd.* case.

10. The Texas court also stated that it agreed "with most [but not all] of what the Third Circuit stated in *Ballay*." *Anheuser-Busch Cos.*, Pet. A26. Again, the Texas court by this statement signified its respectful independence from federal precedent.

Finally, in its most forceful and direct statement demonstrating its independent application of the Texas Act, the Texas court stated that:

> We find *nothing in the Texas statute* suggesting that it does not also apply. In fact, *the language of the Texas statute is arguably broader* than the comparable federal language.

Anheuser-Busch Cos., Pet. A28. These statements alone establish the independence of the Texas court's application of state law.

The plain statement test does not require the use of any particular phraseology to establish the independence of a court's decision under state law. *See Sochor v. Florida*, 112 S. Ct. 2114, 2119-20 (1992) (state court's statement that claim was "not preserved for appeal" amounted to plain statement sufficient under *Long*); *Ylst v. Nunnemaker*, 111 S. Ct. 2590, 2595-6 (1991) (later unexplained order upholding judgment and rejecting the same claim presumed to rest on the same ground); *Coleman*, 111 S. Ct. at 2558-60 (1991) (Virginia court's decision fairly appeared to be based on state grounds even though no express statement to that effect was made); *Long*, 463 U.S. at 1040 (presumption that decision is not based on independent grounds only arises if opinion "fairly appears" to rest on federal law).

Moreover, state courts should be given the opportunity "to develop state jurisprudence unimpeded by federal interference." *Long*, 463 U.S. at 1041. The Texas court took that opportunity in this case. To grant review would unnecessarily undermine this development of Texas securities law and infringe on the ability of Texas courts to independently develop and refine that law in the future. Few times have courts interpreted the Texas Act. This rare opinion, merely looking to federal decisions for guidance in the development of Texas law, should not be lightly cast aside.

The Texas court was satisfied that the Texas Act applied to this transaction as it "is arguably broader than the comparable federal language." *Anheuser-Busch Cos.*, Pet. A28. Therefore, the court cautiously applied the Texas Act "in accordance with [its] interpretation of the federal statute." *Id.* The Texas court judiciously avoided unnecessary discussion of the state law leaving to another day deliberation of the outer limits of the Texas Act. It would be imprudent for this Court to demand that a state court do any more than apply the state's law to the facts of the particular case before it.

In summary, the Texas court's decision to use federal law as a "reliable guide," determine the intent of the Texas Legislature, state that the Texas statute applied and was broader than the federal language, voluntarily "adopt" reasoning in federal cases, and discuss and disagree with another state court decision construing the Texas Act fulfills the plain statement test announced in *Long*. Consequently, the *Long* presumption for Supreme Court jurisdiction does not arise and review of this case would be an improper exercise of this Court's jurisdiction. *Coleman*, 111 S. Ct. at 2558; *Long*, 463 U.S. at 1040-41.

B. The Texas Court Awarded the Only Available Remedy.

So-called rescissory damages are the only remedy available under section 12(2) and the Texas Act for a defrauded buyer who still owns the stock which the seller induced it to purchase through material misrepresentations. 15 U.S.C.A. § 771(2) (West 1988); Tex. Rev. Civ. Stat. Ann. art. 581-33A(2), D(1) (Vernon Supp. 1994). Quite simply, section 12(2) and the Texas Act mandate that a defrauded buyer recover the consideration paid for the stock less any income received on the security. *Randall v. Loftsgaarden*, 478 U.S. 647, 655-56 (1986); *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287-88 (1940). Petitioners finally concede this point, albeit only as to section 12(2). Pet. 23. Petitioners, of course, ignore the fact that the Texas court specifically awarded this relief

under the Texas Act independently of its discussion of section 12(2) and *Randall.* As discussed above, this adequate and independent state ground for the judgment below leaves no reason for the Court to review the decision.

Further, the Texas court's application of *Randall* is anything but controversial. Indeed, Petitioners do not cite any case which disparages, disagrees with, or draws into question this Court's unequivocal pronouncement that the sole remedy available under section 12(2) is recovery of the purchase price, plus interest, less any income the buyer received on the security. Without a conflict in decisions, there is no special or important reason for review. *See* Sup. Ct. R. 10.1.

Section 12(2) itself does not even speak of rescission but rather in clear and unequivocal terms prescribes the relief to be given. Nonetheless, Petitioners leap from this Court's shorthand description of that relief as "rescissory damages" to the conclusion that common law equitable principles govern the availability of this lone remedy. Nothing in the statute dictates that result.

The only condition for recovery is the defrauded buyer's tender of the security to the seller. *Wigand v. Flo-Tek, Inc.*, 609 F.2d 1028, 1034 (2d Cir. 1979). For purposes of section 12(2), tender of the stock returns the parties to the status quo. *Id.* at 1035; *Chapman v. Dunn,* 414 F.2d 153, 160 (6th Cir. 1969); *Stadia Oil & Uranium Co. v. Wheelis,* 251 F.2d 269, 274 (10th Cir. 1957). There is no dispute that Summit tendered Herby's stock to Petitioners immediately upon learning of the misrepresentations. The jury found that Summit notified Petitioners within a reasonable time of its intention to rescind the transaction and offered to return Herby's stock to Cambell Taggart. [Tr. 716].

Moreover, the jury found that Summit neither knew of nor should have discovered Petitioners' misrepresentations until

August 12, 1988. [Tr. 764]. By October 1988, Summit had sued Petitioners under section 12(2) and the Texas Act. In the interim, Summit did not ratify the stock purchase [Tr. 765], did nothing to estop itself from asserting its claims [Tr. 767], and did nothing to cause the value of Herby's stock to decline. [Tr. 768]. The jury further found that Summit's claims under neither section 12(2) nor the Texas Act were barred by laches. [Tr. 706, 712]. Consequently, the fact that the parties could not be returned to the status quo is immaterial.

Even under equitable principles, the trial court would have acted well within its discretion in rescinding the transaction.[11] For example, in its pre-*Randall* opinion, the court in *Gannett Co. v. The Register Publishing Co.*, 428 F. Supp. 818 (D. Conn. 1977), rejected a rescission claim only after finding that the buyer knew of the fraud almost immediately after the transaction closed but failed to promptly tell the seller that it intended to rescind and ratified the transaction. *Id.* at 832-33, 837, 839. Of course, the jury in this case found exactly the opposite. Moreover, the court in *Gannett* emphasized that rescission might have been appropriate if the only objection had been an alleged inability to return the parties to the status quo due to a decline in the market value of the stock. *Id.* at 826, 831 n.32, 840. Indeed, the court noted that if that were the sole objection it would have had to determine whether the decline was the buyer's fault. *Id.* at 840.

Here, of course, Summit did not cause a decline in the value of Herby's stock. Rather, Summit's parent, Dunnam-Snyder, infused almost $3.4 million into Herby's trying to keep it alive while this litigation dragged on. [Def.Ex. 16; SF. III - 213-14; V - 472-73; VI - 607-08, 629]. Unable to fund Herby's further, Respondents placed it into bankruptcy.

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11. Summit further questions Petitioners' implied claim that a review of the trial court's exercise of its equitable powers raises a special or important issue for this Court's review. *See* Sup. Ct. R. 10.1.

Of course, even the court in *Johns Hopkins Univ. v. Hutton*, 297 F. Supp. 1165 (D. Md. 1968), *aff'd in part and rev'd in part on other grounds*, 422 F.2d 1124 (4th Cir. 1970), *cert. denied*, 416 U.S. 916 (1974), would have rescinded the transaction in this case. That court observed that a seller of securities liable under section 12(2) "should not be able to shield itself from rescission by complaining that [the buyer] used bad judgment in trying to protect its investment." *Id.* at 1225. Noting that this is the only remedy available to a defrauded buyer who still owns the security, the court refused to resolve the issue of how far the security can be changed before the remedy is no longer available. *Id.* at 1226. Rather, it concluded that "the provisions of Section 12(2) and the equities of this case call for the application of the remedy of rescission." *Id.* at 1226. Even with respect to the latter, the court considered only whether the buyer made an adequate, timely tender of the stock, which it did by suing for rescission. Like this case, the court found that the buyer had only taken those steps it felt advisable to protect its investment. *Id.* at 1224-25. That court would also have visited any decline in the value of Herby's stock on Petitioners.

Petitioners' reliance on *Bridgen v. Scott*, 456 F. Supp. 1048 (S.D. Tex. 1978), is similarly ill-founded. There, the court refused to rescind the transaction only because the plaintiffs delayed seeking rescission for 20 months after they learned of the fraud. *Id.* at 1059-60. Although the court noted that rescission generally calls for cancellation of the bargain and return of the parties to the status quo, the case relied upon by the court also held that "where this is impossible because of the disposal or retirement of the stock, . . . what restitutional damages are to be awarded must depend upon the facts of the particular case." *Id.* at 1059 (quoting *Myzel v. Fields*, 386 F.2d 718 (8th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968)).

Moreover, the *Bridgen* court specifically noted that but for lack of proof, plaintiffs might have been entitled to rescissory

damages under *Garnatz v. Stifel, Nicholaus & Co.*, 559 F.2d 1357 (8th Cir. 1977). The *Garnatz* court specifically held that rescissory damages were appropriate to compensate the plaintiff for the decreased value of the bonds purchased despite the fact that none of the defendants caused the bonds to decline in value. *Id.* at 1361.

Finally, Petitioners' quote from *Wigand* is out of context and utterly disregards the court's holding. The court held that "[t]he value of the stock itself is irrelevant insofar as relief under section 12(2) is concerned." *Wigand*, 609 F.2d at 1036. Quite simply, the court appreciated Congress' ability to say what it meant. Congress said that the violator "shall be liable" for "the consideration paid . . . less the amount of any income received . . . upon tender of such security. . . ." 15 U.S.C.A. § 771(2) (West 1988). That is the remedy the *Wigand* court imposed, and the relief the Texas court was required to give in this case. *See also Casella v. Webb*, 883 F.2d 805,808-09 (9th Cir. 1989) (rescissory damages are the only remedy even where the company invested in is in bankruptcy).

Petitioners admit that a rescissory damage award is the only remedy available under section 12(2) for a defrauded buyer who still owns the security but would have this Court deny that relief because Summit asserted other theories of recovery. Petitioners cite no precedent for this odd jurisprudence. Since Summit prevailed on all of its claims, it is entitled to select the remedy most favorable to it. *Randall*, 478 U.S. at 667 (Blackmun, J., concurring). Summit chose to recover rescissory damages under the Texas Act which allowed it to recover very favorable rates of pre-and post-judgment interest and attorneys' fees not available under federal law. There is no compelling reason for this Court to review that award.

C. Summit Did Not Knowingly Release Its Claims.

Section 3 of the purchase agreement required Campbell Taggart to prepare and deliver to Summit a post-closing balance sheet to be used in determining the adjustment to the purchase price required by section 2. The adjustment was to be calculated by tallying Herby's current assets and current liabilities as of the closing. [Ely Ex. 52A]. The purchase agreement expressly provided for the future execution of mutual releases relating to the adjustment.

During this adjustment period, a dispute arose over Petitioners' representations in section 8.4(c) of the agreement relating to Herby's inventory. That isolated dispute was resolved on February 1, 1988, by an agreement regarding the post-closing adjustment to the purchase price. Of course, Summit neither knew of nor should have discovered Petitioners' misrepresentations by that time. Rather, the jury found that Summit did not know and should not have learned of these misrepresentations until August 12, 1988, some six months after the post-closing adjustment was made. [Tr. 764]. Not surprisingly, therefore, the agreement does not mention those claims.

The Texas court found that Summit's unknown claims could not be released in the face of the anti-waiver provisions of both the federal and Texas acts. *Anheuser-Busch Cos.*, Pet. A11-13. Although no court has found either law to prohibit the settlement or release of known matured claims, the lower courts have scrupulously preserved such claims from unintentional or involuntary waiver. *E.g., Petro-Ventures, Inc. v. Takessian*, 967 F.2d 1337, 1340-41 (9th Cir. 1992); *Hamilton v. Harrington*, 807 F.2d 102, 106 (7th Cir. 1986); *Burgess v. Premier Corp.*, 727 F.2d 826, 831 (9th Cir. 1984); *Goodman v. Epstein*, 582 F.2d 388, 402-03 (7th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979); *Murtaugh v. University Computing Co.*, 490 F.2d 810, 816-17 (5th Cir.), *cert.*

denied, 419 U.S. 835 (1974); *American Gen. Ins. Co. v. Equitable Gen. Corp.*, 493 F. Supp. 721, 750-51 (E.D. Va. 1980) (applying both federal and Texas law). Because the jury specifically found that Summit neither knew nor should have known of the misrepresentations at the time the agreement was signed, the Texas court naturally rejected Petitioners' claim that the federal and state securities claims were barred.

The decision in *Petro-Ventures* is not to the contrary. First, the court reaffirmed that a release is generally valid only as to claims actually known and mature at the time of the release. 967 F.2d at 1340-41. Summit's claims were neither known nor mature. Second, the Ninth Circuit deferred to the trial court's factual conclusion as to the intent of the release based on extrinsic evidence. *Id.* at 1339-40. In this case, the trial court simply accepted the jury's finding which has never been attacked by Petitioners. As such, Petitioners' jury argument in their petition to the effect that Summit had the means of learning of the misrepresentations before it signed the release is simply irrelevant.

Moreover, this case does not fit into the limited ruling announced in *Petro-Ventures*. Petitioners and Summit were not in litigation when the release was signed. The *Petro-Ventures* court decided only the "validity of a release of all unknown claims in the context of a settlement of on-going litigation. . . ." *Id.* at 1338. As in the Ninth Circuit's earlier decision in *Burgess*, which the *Petro-Ventures* panel did not purport to overturn, Petitioners and Summit were still dealing with each other in a purely business relationship when the adjustment to the purchase price was made. Even the *Petro-Ventures* panel acknowledged that under such circumstances the general rule applied in *Burgess* would control. *Id.* at 1341-42.

Petitioners want this Court to ignore the jury's finding that Summit neither knew of nor should have known that Petitioners had defrauded Summit until well after Summit settled the post-

closing adjustment. Yet, they have never attacked that finding. That is precisely why the Texas court rejected Petitioners' point of error below. *Anheuser-Busch Cos.*, Pet. A12-13. The Texas court accepted the consensus among the courts that an unknown claim cannot unintentionally be waived under section 12(2) and the Texas Act. There is simply no compelling reason for this Court to review that decision.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — STATUTORY PROVISIONS

Tex. Rev. Civ. Stat. Ann. art. 581-33A(2) (Vernon Supp. 1994), provides:

A. Liability of Sellers.

* * *

(2) Untruth or Omission. A person who offers or sells a security (whether or not the security or transaction is exempt under Section 5 or 6 of this Act) by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, is liable to the person buying the security from him, who may sue either at law or in equity for rescission, or for damages if the buyer no longer owns the security. However, a person is not liable if he sustains the burden of proof that either (a) the buyer knew of the untruth or omission or (b) he (the offeror or seller) did not know, and in the exercise of reasonable care could not have known, of the untruth or omission. The issuer of the security (other than a government issuer identified in Section 5M) is not entitled to the defense in clause (b) with respect to an untruth or omission (i) in a prospectus required in connection with a registration statement under Section 7A, 7B, or 7C, or

(ii) in a writing prepared and delivered by the issuer in the sale of a security.

Tex. Rev. Civ. Stat. Ann. art. 581-33D (Vernon Supp. 1994), provides:

D. Rescission and Damages. For this Section 33:

(1) On rescission, a buyer shall recover (a) the consideration he paid for the security plus interest thereon at the legal rate from the date of payment by him, less (b) the amount of any income he received on the security, upon tender of the security (or a security of the same class and series).

(2) On rescission, a seller shall recover the security (or a security of the same class and series) upon tender of (a) the consideration he received for the security plus interest thereon at the legal rate from the date of receipt by him, less (b) the amount of any income the buyer received on the security.

(3) In damages, a buyer shall recover (a) the consideration he paid for the security plus interest thereon at the legal rate from the date of payment

by him, less (b) the value of the security at the time he disposed of it plus the amount of any income he received on the security.

(4) In damages, a seller shall recover (a) the value of the security at the time of sale plus the amount of any income the buyer received on the security, less (b) the consideration paid the seller for the security plus interest thereon at the legal rate from the date of payment to the seller.

(5) For a buyer suing under Section 33C, the consideration he paid shall be deemed the lesser of (a) the price he paid and (b) the price at which the security was offered to the public.[12]

(6) On rescission or as a part of damages, a buyer or a seller shall also recover costs.

(7) On rescission or as a part of damages, a buyer or seller may also recover reasonable attorney's fees

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12. Article 581-33C applies only to the liability of non-selling issuers who register securities under Section 7a, 7b or 7c of the Texas Act or under Section 6 of the Securities Act of 1933.

> if the court finds that the recovery would be equitable in the circumstances.

Tex. Rev. Civ. Stat. Ann. art. 581-33E (Vernon Supp. 1994), provides:

> E. Time of Tender. Any tender specified in Section 33D may be made at any time before entry of judgment.

Tex. Rev. Civ. Stat. Ann. art. 581-33L (Vernon Supp. 1994), provides:

> L. Waivers Void. A condition, stipulation, or provision binding a buyer or seller of a security to waive compliance with a provision of this Act or a rule or order or requirement hereunder is void.